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Vagueness and Indecency

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VAGUENESS AND INDECENCY

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I. INTRODUCTION

In April 1987, the Federal Communications Commission (FCC or Commission) issued warnings to three radio stations for broadcasting material that the Commission deemed indecent.[1] Relying on a definition of indecency it had first announced twelve years before, the Commission found that each of the three stations had broadcast material describing sexual and excretory activities and organs in a "patently offensive" manner.[2] In one case, the offending material consisted of a broadcast personality's comments;[3] in another, it consisted of excerpts from a long-running play;[4] in the

* Associate Professor, Wayne State University Law School. I am grateful to the participants in the VILLANOVA SPORTS & ENTERTAINMENT LAW JOURNAL'S Symposium for encouraging me to think harder about broadcast indecency. I owe thanks, as always, to Jessica Litman for her insightful and invaluable comments.

1. Pacifica Found. (KPFK-FM), 2 F.C.C.R. 2698, *on reconsideration*, 3 F.C.C.R. 930 (1987), *vacated*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Regents of the Univ. (KCSB-FM), 2 F.C.C.R. 2703, *on reconsideration*, 3 F.C.C.R. 930 (1987), *vacated*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988); Infinity Broadcasting Corp. (WYSP-FM), 2 F.C.C.R. 2705, *on reconsideration*, 3 F.C.C.R. 930 (1987), *aff'd in part*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

2. Infinity Broadcasting Corp. (WYSP-FM), 3 F.C.C.R. 930 (1987), *vacated in part*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

3. The broadcast personality was Howard Stern, whose six o'clock a.m. to ten o'clock a.m. radio program was successful in several major markets, notwithstanding charges of offensiveness and tastelessness. *Infinity*, 2 F.C.C.R. at 2704; see *infra* notes 47-49 and accompanying text. The excerpts cited by the Commission include this one:

> Stern: "Have you ever had sex with an animal?"
> Caller: "No."
> Stern: "Well, don't knock it. I was sodomized by Lambchop, you know that puppet Sherri Lewis holds?"
> Stern: "Baaaaah. That's where I was thinking that Sherri Lewis, instead of like sodomizing all the people at the Academy to get that shot on the Emmys she could've had Lambchop do it."

Id. at 2706.

4. The play, "Jerker," was then running in Los Angeles and was broadcast at ten o'clock p.m. on a public-radio program entitled "IMRU." *Pacifica*, 2 F.C.C.R. at 2699. Much of the play's dialogue consisted of telephone conversations between two gay men with AIDS discussing their sexual fantasies and experiences, sometimes in graphic terms. *Id.* at 2700. The Commission brushed off the licensee's argument that the play was serious, long-running and critically acclaimed, an affirmation of life in the face of death. *Id.* It responded that "we find it hard to imagine the broadcast of sexually-related language in a more patently offensive

third, it consisted of a sexually explicit song.[5] The Commission stated that broadcasts of "patently offensive" sexually-oriented material, if aired before midnight,[6] violated a federal statute prohibiting the broadcast of "obscene, indecent, or profane language."[7]

Broadcasters, networks, program producers and public interest groups sought review in the United States Court of Appeals for the District of Columbia Circuit.[8] They argued, among other things, that the Commission's standard was unconstitutionally vague.[9] How was a broadcaster to know, they asked, whether the FCC would deem its treatment of sexual matters to be "patently offensive?" In issuing the sanctions, the Commission had stated that it would judge patent offensiveness with reference to "contemporary community standards for the broadcast medium."[10] On reconsideration, the agency had explained that the Commissioners would look to what "an average broadcast viewer or listener" in the United States would deem patently offensive.[11] It was hardly clear, though, what programming the Commissioners would think the "average" American viewer considered "patently offensive." The Commission insisted that one could determine whether a work was "patently offensive" only on a case-by-case basis, after taking into account the "host of variables" that made up each work's "context."[12] This made matters nearly hopeless for the broadcaster seeking clarity and predictability.

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manner," *Infinity*, 3 F.C.C.R. at 932, and referred the matter to the Justice Department for possible criminal prosecution for obscenity. *Pacifica*, 2 F.C.C.R. at 2701.

5. The song, played at about ten o'clock p.m. on a college radio station, was called "Makin' Bacon." *Regents*, 2 F.C.C.R. at 2703. With the chorus, "Makin' bacon is on my mind," the song's lyrics included the following: "Come here baby, make it quick / Kneel down there and suck on my dick;" "Turn around baby, let me take you from behind / Makin' bacon is on my mind;" and, "Get down baby on your hands and knees / Take my danish and give it a squeeze." *Id.*

6. The Commission explained that it was illegal to air such programming when there was a "reasonable risk that children may be in the audience." *Infinity*, 3 F.C.C.R. at 930. It elaborated: "12:00 midnight is our current thinking as to when it is reasonable to expect that it is late enough to ensure that the risk of children in the audience is minimized." *Id.* at 937 n.47.

7. 18 U.S.C. § 1464 (1988) ("Whoever utters any obscene, indecent, or profane language by means of radio communication shall be fined under this title or imprisoned not more than two years, or both.").

8. Action for Children's Television v. FCC, 852 F.2d 1332, 1334 (D.C. Cir. 1988).

9. *See id.* at 1338.

10. *Pacifica*, 2 F.C.C.R. at 2699.

11. *Infinity*, 3 F.C.C.R. at 933.

12. *Id.* at 932 (quoting FCC v. Pacifica Found., 438 U.S. 726, 750 (1978)).

Judge Ruth Bader Ginsburg (later Justice Ginsberg), writing for the D.C. Circuit, rejected petitioners' vagueness challenge.[13] FCC regulation of indecent speech, she noted, was not appearing before the courts for the first time. In 1975, the Commission had sanctioned the Pacifica Foundation for "indecent" programming, and the Supreme Court had upheld that sanction.[14] The FCC, in *FCC v. Pacifica Foundation*, had applied a definition of indecency identical to the one it later used in the 1987 cases. The Supreme Court had quoted the FCC's definition with apparent approval, and upheld the Commission's sanction, without addressing the question of vagueness (although the matter had been raised in an amicus brief).[15] Judge Ginsburg concluded that the Court had rejected any vagueness attack *sub silentio*: "[I]f acceptance of the FCC's . . . definition of 'indecent' as capable of surviving a vagueness challenge is not implicit in *Pacifica*, we have misunderstood Higher Authority and welcome correction."[16]

By virtue of the Supreme Court's silence in *Pacifica*, and the D.C. Circuit's acceptance of that silence as dispositive, no court

13. *Action for Children's Television*, 852 F.2d at 1338-39.

14. *Pacifica Found.*, 438 U.S. at 726.

15. *See Action for Children's Television*, 852 F.2d at 1338 n.9.

16. *Id.* at 1339.

This ruling, to my mind, was questionable. The licensee in *Pacifica* had attacked the Commission on overbreadth grounds; the Supreme Court upheld the agency without addressing that claim either. The D.C. Circuit, though, agreed to rule on a similar overbreadth argument in the 1987 case. As Judge Ginsburg explained, the *Pacifica* Court declined to address the overbreadth attack because it had treated the FCC determination "strictly as an ad hoc ruling," *id.* at 1337, and had seen its review as "limited to the question whether the Commission has the authority to proscribe this particular broadcast." *Id.* at 1339 n.10 (quoting *Pacifica*, 438 U.S. at 742 (opinion of Stevens, J.)). The D.C. Circuit saw that approach as inappropriate for reviewing the FCC decisions before it, because those decisions were intended to communicate a general standard of conduct binding on all broadcasters. *Id.* at 1339. As a result, the D.C. Circuit entertained petitioners' argument that the FCC's generic definition of indecency was overbroad. *Id.*

By that logic, the D.C. Circuit should have considered petitioners' vagueness challenge as well. In *Pacifica*, the radio station had not contested that its speech fell within the Commission's definition; the essence of any vagueness argument could only be that *other* persons, not before the Court, would be chilled from speaking because of uncertainty as to whether the Commission would deem their speech "indecent." *Pacifica*, 438 U.S. at 742; see *infra* note 105 and accompanying text. That argument was functionally similar to an overbreadth claim. *See, e.g.*, Dombrowski v. Pfister, 380 U.S. 479 (1965) (treating overbreadth and vagueness interchangeably for this purpose). Because the *Pacifica* Justices limited their analysis to the precise facts before them, they could not consider such an argument. But the D.C. Circuit, entertaining an overbreadth attack because the FCC's definition of indecency created a rule of general applicability affecting persons not before the court, should have entertained a vagueness attack for the same reason. *Action for Children's Television*, 852 F.2d at 1339.

since then has squarely faced the question whether the FCC's definition of indecency is unconstitutionally vague. The D.C. Circuit has relied four times on Judge Ginsburg's reasoning to avoid the issue — in 1988, 1991 and twice in 1995.[17] The Supreme Court has now agreed to decide that question, in a case involving indecent speech on cable television.[18] The matter is problematic: It is far from clear whether the FCC's approach to indecency satisfies the usual First Amendment requirements of predictability and clarity. Part I of this Article will question whether the Commission's indecency doctrine exhibits the precision that First Amendment doctrine ordinarily requires. Part II will examine the *Pacifica* decision and its treatment (or nontreatment) of the vagueness question. Part III will suggest that the vagueness of the broadcast indecency rule should be unsurprising: while broadcast indecency law departs from the usual First Amendment rules both procedurally and substantively, it does so in a way typical of broadcast regulation as a whole.

II. HOWARD STERN, GERALDO RIVERA AND UNCLE BONSAI

Ordinary First Amendment doctrine teaches that government may seek to punish bad speech only pursuant to well-defined, easy-to-apply rules.[19] Where there are no such rules, regulators will be able to act arbitrarily, engaging in impermissible censorship.[20]

17. *See* Action for Children's Television v. FCC, 58 F.3d 654 (D.C. Cir. 1995); Alliance for Community Media v. FCC, 56 F.3d 105, 129 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 471 (1995); Action for Children's Television v. FCC, 932 F.2d 1504, 1507-08 (D.C. Cir. 1991); *Action for Children's Television*, 852 F.2d at 1338-39. *Cf.* Information Providers' Coalition v. FCC, 928 F.2d 866, 874-76 (9th Cir. 1991) (rejecting vagueness challenge to similar definition in FCC rule restricting "indecent" telephone communication; Ninth Circuit reasoned that FCC's language had "received the imprimatur of the Court" in *Pacifica*).

Judges Wald, Rogers and Tatel, dissenting from the 1995 *Action for Children's Television* ruling, reluctantly acknowledged that "[b]y now, in the posture of the current case, it is probably too late to revisit" the court's 1988 rulings on vagueness and overbreadth. 58 F.3d at 685 (Wald, J., dissenting). Nonetheless, they stressed that "the chill brought about by the Commission's open-textured definition of indecency" is "quite substantial." *Id.* (Wald, J., dissenting).

18. Alliance for Community Media v. FCC, 56 F.3d 105 (D.C. Cir. 1995), *cert. granted*, 116 S. Ct. 471 (1995).

19. *See, e.g.*, Smith v. Goguen, 415 U.S. 566, 577 (1974). *See generally* Frederick Schauer, *The Second-Best First Amendment*, 31 WM. & MARY L. REV. 1 (1989).

20. Kolender v. Lawson, 461 U.S. 352, 358 (1983); Smith v. Goguen, 415 U.S. 566, 574-76 (1974); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972). A body of law capable of arbitrary application is "inherently inconsistent with . . . valid . . . regulation because such discretion has the potential for becoming a means of suppressing a particular point of view." Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981).

Speakers will censor themselves, to avoid the regulator's unpredictable sanction.[21] This is the source of the vagueness doctrine in the First Amendment context:[22] When a vagueness challenge is brought to a rule restricting speech, the court must examine that rule to determine whether it " 'defines boundaries sufficiently distinct' [to guide] . . . citizens, policemen, juries, and appellate judges."[23] A rule regulating speech is constitutional only if it clearly marks "the boundaries of the forbidden areas."[24] Otherwise, it offends vagueness doctrine for two reasons: First, it will cause decisions whether particular speech is within the scope of the prohibition to be decided by regulators on an ad hoc basis, inviting arbitrary and biased enforcement.[25] Second, it will lead citizens, seeking to avoid prosecution but unsure of the prohibition's scope, to censor their own speech, forgoing expression the law might plausibly be read to permit.[26]

In *Smith v. Goguen*, thus, the Supreme Court considered the case of one Valarie Goguen, who had worn a small version of the U.S. flag sewn to the seat of his pants. A state court had convicted him of violating a statute making it illegal to "treat[ ] contemptuously the flag of the United States."[27] Justice Powell, writing for the Court, explained that because the statute was capable of restricting protected expression, it was subject to a stringent vagueness test.[28] The statute failed that test. It did not "draw reasonably clear lines

21. *See Grayned*, 408 U.S. at 109.

22. Although the due process clause proscribes vagueness in any penal statute, the Constitution imposes more stringent requirements where First Amendment rights are at stake. *Goguen*, 415 U.S. at 573 & n.10. The stricter obligation applies in any case in which "the threat of sanctions may deter [the] exercise [of] . . . First Amendment freedoms." NAACP v. Button, 371 U.S. 415, 432-33 (1963).

The Supreme Court sometimes refers to the heightened requirement of precision in speech cases as arising under the First Amendment, *see, e.g., id.* at 431-38, and sometimes as arising under the due process clause, *see, e.g., Goguen*, 415 U.S. at 574. When the Court describes itself as applying due process law in this context, though, it stresses that its analysis would be more relaxed except for the fact that the challenged law "is capable of reaching expression sheltered by the First Amendment." *Id.* In this Article, I will refer to the Court's heightened vagueness analysis for cases involving First Amendment rights as "First Amendment" vagueness and I will refer to the Court's more relaxed vagueness analysis in other cases, not involving protected speech, as "due process" vagueness.

23. *Grayned*, 408 U.S. at 114 (quoting Chicago v. Fort, 262 N.E.2d 473, 476 (Ill. 1970)).

24. Baggett v. Bullitt, 377 U.S. 360, 372 (1964).

25. *See Grayned*, 408 U.S. at 108-09.

26. *See Baggett*, 377 U.S. at 372.

27. *Goguen*, 415 U.S. at 568-69.

28. *Id.* at 581-82. The Court described itself as applying due process vagueness doctrine, but explained that its scrutiny was heightened because First Amendment rights were at stake. *Id.* at 572-73; *see supra* note 22.

between the kinds of [treatment of the flag] . . . that are criminal and those that are not."[29] Its imprecision left enforcement to the "personal predilections" of those enforcing the law, and thus invited selective prosecution.[30] In the absence of "any ascertainable standard for inclusion and exclusion," law enforcers had "unfettered latitude;" they were "free to react to nothing more than their own preferences for treatment of the flag."[31]

In *Baggett v. Bullitt*,[32] the Court confronted legislation requiring state employees to swear, among other things, that they were not "subversive persons" as defined by statute — that they would not commit, attempt, assist, advocate, advise or teach any act intended to "overthrow, destroy or alter, or to assist in the overthrow, destruction or alteration of, the constitutional form of the government of the United States . . . by revolution, force or violence."[33] The Court struck down the legislation on the ground that the prohibitions imposed by the oath were unconstitutionally vague.[34] The uncertain meaning, Justice White explained, would lead oath-takers to " 'steer far wider of the unlawful zone' than if the boundaries of the forbidden areas were clearly marked."[35] Sensitive to "the perils posed by the oath's indefinite language," they could avoid sanction "only by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited."[36]

These rules apply to the FCC, as they do to any governmental entity. They apply with special force to the FCC, because the FCC is a licensing body. In response to indecency violations, it can issue fines; in extreme cases it can revoke a station's license.[37] When a licensing decision is bounded only by vague rules, "post hoc rationalizations . . . and the use of shifting or illegitimate criteria [are] far too easy."[38] Courts may be unable to detect the regulator's "illegitimate abuse of censorial power," and citizens will be "intimidate[d] . . . into censoring their own speech."[39] Licensing bodies in particular, therefore, must be guided by "narrow, objective and def-

29. *Goguen*, 415 U.S. at 574.
30. *Id.* at 575.
31. *Id.* at 578; *see, e.g.*, Kolender v. Lawson, 461 U.S. 352, 357-58 (1983).
32. 377 U.S. 360 (1964).
33. *Baggett*, 377 U.S. at 362 (quoting WASH. REV. CODE § 9.81.010(5) (1951)).
34. *Id.* at 375-80.
35. *Id.* at 372 (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).
36. *Id.*
37. 47 U.S.C. §§ 312(a), 503(b) (1988).
38. City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 758 (1988) (emphasis omitted).
39. *Id.* at 757-58.

inite standards,"[40] for government " 'discretion has the potential for becoming a means of suppressing a particular point of view.' "[41]

Against this backdrop, it is far from clear whether the FCC's regulation of "patently offensive" speech meets the case law's test of precision, specificity and clarity. As in *Smith v. Goguen*, there is no bright line defining the categories of sexually explicit speech that "contemporary . . . standards" would and would not deem "patently offensive." Nor does reference to the "average" person lend certainty to the FCC's standard, at least as long as the Commissioners in every case supply their own ad hoc judgments of what they think the average person considers offensive. The Commissioners, seeking to look through the eyes of the average person, have little choice but to base their decisions on their own, perhaps changing, views. The category of patently offensive speech thus seems sufficiently unmoored that law enforcers are "free to react to nothing more than their own preferences."[42] This invites arbitrariness in enforcement, and seems likely to magnify the scope of suppression by leading broadcasters to restrict their speech to "that which is unquestionably safe."[43]

Given the ambiguity of its standard, the FCC might have sought to maximize predictability in its indecency rulings by introducing some clear-cut subsidiary rules, or by seeking to limit its analysis whether a broadcast was "patently offensive" to a short list of factors that broadcasters could weigh in advance. The agency did not take that course. Rather, the FCC insists that its indecency determinations are "highly fact-specific and are necessarily made on a case-by-case basis."[44] They are not susceptible to clear-cut rules; they are based on " 'context,' " which in turn depends on a " 'host of variables,' "[45] including the work's "relative merit."[46] This, too, contravenes First Amendment doctrine. Ordinary First Amendment law limits government regulators to black-letter determinations, in which results turn mechanically on a limited number of

40. Forsyth County v. Nationalist Movement, 505 U.S. 123, (1992) (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).

41. *Id.* (quoting Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981)).

42. Smith v. Goguen, 415 U.S. 566, 578 (1974).

43. Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (footnote omitted).

44. Sagittarius Broadcasting Corp., 7 F.C.C.R. 6873, 6874 (1992).

45. Infinity Broadcasting Corp. (WYSP-FM), 3 F.C.C.R. 930, 932 (1987) (quoting *Pacifica Found.*, 438 U.S. at 750), *aff'd in part*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

46. *Sagittarius*, 7 F.C.C.R. at 6874.

easily ascertainable facts.[47] For government to make a law enforcement decision through the ad hoc, situationally sensitive application of a vague policy standard, taking into account all relevant facts, is the polar opposite of that sort of determination.[48] Such an approach maximizes the agency's discretion and minimizes the predictability of its decision-making.[49] It ignores the concerns underlying the Court's vagueness jurisprudence. Given the FCC's process, it seems impossible that the agency could make indecency decisions in a manner yielding the predictability and regularity that First Amendment lawyers demand.

Indeed, it is not clear that aggressive indecency enforcement *could* satisfy ordinary First Amendment doctrine. The concepts of indecency and offensiveness seem necessarily to rely on notions of good taste. Where good taste is at issue, though, "[i]f evenhanded and accurate decision making is not always impossible . . . , it is at least impossible in the cases that matter."[50] Vagueness, thus, seems inherent in any regulation of "offensive" sexually explicit speech.

An examination of the FCC's actual enforcement practices tends to confirm those suspicions. The FCC has aimed much of its enforcement fire against Howard Stern, the New York radio personality. Stern hosts the top-rated morning radio show in the nation's largest markets.[51] Estimates of his daily audience range from three million to sixteen million listeners.[52] His show is raunchy and taste-

47. *See* Jonathan Weinberg, *Broadcasting and Speech*, 81 CAL. L. REV. 1101, 1167-69 (1993).

48. *See* Frederick Schauer, *Formalism*, 97 YALE L.J. 509, 536-44 (1988); Kathleen M. Sullivan, *The Supreme Court, 1991 Term — Forward: The Justices of Rules and Standards*, 106 HARV. L. REV. 22, 58-59 (1992); Weinberg, *supra* note 47, at 1167-71.

49. *See* Action for Children's Television v. FCC, 58 F.3d 654, 684 (D.C. Cir. 1995) (Wald, J., dissenting):

> Because the Commission insists that indecency determinations must be made on a case-by-case basis and depend upon a multi-faceted consideration of the context of allegedly indecent material, broadcasters have next-to-no guidance in making complex judgment calls. Even an all clear signal in one case cannot be relied upon by broadcasters 'unless both the substance of the material they aired and the context in which it was aired were substantially similar.' *Sagittarius Broadcasting Corp.*, 7 F.C.C.R. at 6874. Thus, conscientious broadcasters and radio and television hosts seeking to steer clear of indecency face the herculean task of predicting on the basis of a series of hazy case-by-case determinations by the Commission which side of the line their program will fall on.

Id.

50. Pope v. Illinois, 481 U.S. 497, 505 (1987) (Scalia, J., concurring) (discussing obscenity).

51. Seth T. Goldsami, Note, *"Crucified by the FCC?" Howard Stern, the FCC, and Selective Prosecution*, 28 COLUM. J.L. & SOC. PROBS. 203, 203-04 (1995). Stern is also the author of a best-selling book and the host of a cable television show. *Id.*

52. *Id.* at 204.

less. By February 1994, the Commission had announced its intention to seek fines in excess of $1,675,000 against Infinity Broadcasting, owner of stations carrying the show.[53]

The agency, however, has never sought to take action against a variety of other possible indecency targets. Most notably, the agency has not initiated enforcement action against daytime television talk shows. Those shows also present sexually oriented discussions. One commentator presents this list of topics covered by daytime talk shows, apparently gleaned from about a week of television watching: a "Montel Williams" show in which a scantily dressed guest describes how she plays "Crisco naked twister" with a motorcycle gang; a "Vicki" show featuring strippers performing their routines for the television audience and a scantily dressed woman talking about her job cleaning houses in the nude; and a "Geraldo" show devoted to the topic of "Sexually Assaulted Strippers."[54] Such shows often are broadcast in the late afternoon when children, home from school, are able to watch them.[55]

In response to an Infinity pleading, the FCC staff once explained that a "Geraldo" broadcast discussing sexual techniques was immune from sanction because it was not "intended to pander or titillate and was not otherwise vulgar or lewd."[56] Critics, though, have often suggested that the producers of daytime talk shows typically do intend to pander or titillate;[57] the distinction, at least, is not clear-cut.

In *Guy Gannett Publishing Co.*,[58] the Commission imposed a fine on a radio station for playing the song "Penis Envy" by the folk group Uncle Bonsai. The singers, in clear soprano voices, begin

53. *See* Steven A. Lerman, Esq., 74 R.R.2d 743, 746 (1994) (imposing $400,000 fine against Infinity); *id.* at 747 (Quello, Comm'r, dissenting) (noting that the Commission previously had announced $1,278,750 in other fines).

54. Goldsami, *supra* note 51, at 239 (describing, among others, "Montel Williams: Women Motorcyclists" (Fox television broadcast, Feb. 4, 1994); "Vicki: Women in Sexy Professions" (WPIX television broadcast, Feb. 2, 1994); "Geraldo: Sexually Assaulted Strippers" (WCBS television broadcast, Feb. 8, 1994)).

55. Goldsami, *supra* note 51, at 239 (noting that in New York "Geraldo" aired at four o'clock p.m. and "Montel Williams" at five o'clock p.m.). Other daytime talk shows, including "Donahue," "Oprah," "Sally Jessy Raphael" and "Ricki Lake," are aired in the three o'clock p.m. to six o'clock p.m. time slot. *Id.* at 242 n.281. As I write this article, WGN cable airs "Geraldo" at three o'clock p.m. EST nationally and "Charles Perez" (featuring such programs as "College Student Strippers") at five o'clock p.m. EST. The Howard Stern show, by contrast, airs from six o'clock a.m. to ten o'clock a.m.

56. Sagittarius Broadcasting Corp., 7 F.C.C.R. 6873, 6874 (1992); *see also* Mel Karmazin, 5 F.C.C.R. 7291, 7294 n.3 (1990).

57. *See, e.g.*, Goldsami, *supra* note 51, at 219, 240.

58. 5 F.C.C.R. 7688 (1990).

with the words, "If I had a penis, I'd wear it outside / In cafes and car lots, with pomp and with pride" and finish with, "If I had a penis, I'd still be a girl / But I'd make much more money and conquer the world."[59] The song contains no vulgar words except, perhaps, the word "penis;" the singers imagine a variety of likely and unlikely uses for one.[60] I like the song a lot.

The Commission's letter opinion explained that the song fit "squarely" within the indecency definition because it contained "lewd references to the male genitals and to activities involving male genitals."[61] The sexual meaning of the lyrics was "inescapable."[62] The words were "graphic" and "patently offensive."[63] Assuming, arguendo, that the song was not "pandering or titillating," the Commission stated, it was nonetheless indecent.[64]

This is a puzzle. In the context of the "Geraldo" show, the Commission suggested that a work is not indecent if it treats sexual matters without "pandering or titillating."[65] In *Guy Gannett*, however, the Commission teaches that indecency is too subtle and devious to be reduced to a formula; a work may be indecent even if it is not "pandering or titillating." What elements of context, then, called for the finding of indecency in this case? The letter opinion does not give much guidance. Perhaps it was relevant that the song was played on a radio show hosted by Neil Rogers, who apparently made a practice of on-air sexual references.[66] Perhaps someone on the FCC enforcement staff does not like songs about penises.[67] Perhaps songs about penises are not per se indecent, but in this case

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59. *See id.* at 7689-90 (quoting full song).

60. Here are the song's first two stanzas:

> If I had a penis, I'd wear it outside;
> In cafes and car lots, with pomp and with pride.
> If I had a penis, I'd pamper it proper;
> I'd stay in the tub and use me as the stopper.
>
> If I had a penis, I'd take it to parties;
> Stretch it and stroke it and shove it at smarties.
> I'd take it to pet shows and teach it to stay;
> I'd stuff it in turkeys on Thanksgiving Day.

Id. at 7689.

61. *Id.*

62. *Id.*

63. *Guy Gannett*, 5 F.C.C.R. at 7689-90.

64. *Id.*

65. *See supra* note 56 and accompanying text.

66. *See Guy Gannett*, 5 F.C.C.R. at 7688.

67. *Cf.* Suzannah Andrews, *She's Bare. He's Covered. Is There a Problem?*, N.Y. TIMES, Nov. 1, 1992, § 2 (Magazine), at 13 (noting that movie with visible penis draws near-automatic NC-17 rating although non-NC-17 movies commonly display full frontal female nudity).

the singers used the word "penis" too many times, and in too disrespectful a tone. But nothing in the Commission's decision yields the sort of precision and predictability that First Amendment lawyers normally demand before the government engages in content regulation of speech.[68] The decision suggests to broadcasters that they should stay away from sexually oriented material entirely, so as to avoid the guessing game whether the Commission will find a particular work, in context, to be "titillating," "lewd" or otherwise "patently offensive."

In defense of its standard, the Commission has pointed out that its definition of indecency derives from the definition of obscenity the Court approved in *Miller v. California*.[69] That definition too requires that the work be "patently offensive," and the Justices by a five to four vote upheld it against the vagueness challenge.[70] The FCC argues that the term "patently offensive" is no more "unconstitutionally vague in the indecency context . . . than it [is] . . . in the obscenity context."[71] If the *Miller* definition is sufficiently precise, can the *Pacifica* definition not be?

Perhaps not. In *Miller*, the Court held that state laws banning obscenity must satisfy several requirements. They must limit their coverage to works depicting or describing "sexual conduct . . . specifically defined by . . . state law."[72] They must be limited to works that, "taken as a whole, appeal to the prurient interest in sex"[73] — that is, that incite a "shameful or morbid" sexual response.[74] They must be limited to works that, "taken as a whole, do not have serious literary, artistic, political, or scientific value."[75] Finally, they must be limited to works whose depictions of sexual conduct are "patently offensive."[76] Laws meeting these requirements, Chief Justice Burger wrote, limit their scope to "hard core" materials and

68. *Gannett*, 5 F.C.C.R. at 7688. Guy Gannett may have been the victim of bad lawyering. Counsel's submission, which sought to excuse the song on the ground that it was "silly and puerile" but not indecent, 5 F.C.C.R. at 7688, probably did not help the client's cause. *Id.*

69. 413 U.S. 15 (1973).

70. *Id.* at 26-28. *But cf. id.* at 37-44 (Douglas, J., dissenting); Paris Adult Theatre I v. Slaton, 413 U.S. 49, 83-93, 103 (1973) (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

71. Infinity Broadcasting Corp. (WYSP-FM), 3 F.C.C.R. 930, 932 (1987), *aff'd in part*, Action for Children's Television v. FCC, 852 F.2d 1332 (D.C. Cir. 1988).

72. *Miller*, 413 U.S. at 24.

73. *Id.*

74. Brockett v. Spokane Arcades, 472 U.S. 491, 499 (1985).

75. *Miller*, 413 U.S. at 24.

76. *Id.*

provide adequate notice to those who would traffic in them.[77] It seems likely that the multiple prongs of the *Miller* definition, taken together, define the forbidden zone more securely than does the FCC's singular criterion that indecent material relate somehow to sexual and excretory matters in a "patently offensive" manner. *Miller*, therefore, does not close the door on the vagueness argument in the indecency context.

A more subtle argument in support of the constitutionality of the FCC's approach posits that even if the FCC's standard would be too vague in the context of a total ban on indecent material, it is sufficiently precise to support the mere "channelling" of indecency to nighttime hours.[78] The argument can take two forms. In its first form, it runs like this: While a vague standard entirely criminalizing the distribution of indecent materials would do extensive damage to free speech, the damage done by a vague law's mere channelling of indecent materials is de minimus. Such a law does not lessen the availability of sexually explicit speech during the Commission's nighttime "safe harbor" or in nonbroadcast media. At worst, it shifts the broadcast of such speech from daytime television or radio into the safe harbor, or to other media.[79] Therefore,

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77. *Id.* at 27.

78. This argument echoes a suggestion in Justice Brennan's dissenting opinion in *Paris Adult Theatre I*, 413 U.S. at 73 (Brennan, J., dissenting). Justice Brennan took the position that the *Miller* test was too vague to support the "outright suppression" of allegedly obscene material. *Id.* at 101. He hinted, though, that the same test might be adequate if the state merely sought to regulate the distribution of such materials to children or its obtrusive exposure to unconsenting adults. *Id.* at 112-13. It is worth noting here that Commissioners Robinson and Hooks, who shared Justice Brennan's view that the Court erred in allowing government to ban obscenity, nonetheless joined in the *Pacifica* ruling. *See* Pacifica Found. (WBAI-FM), 56 F.C.C.2d 94, 104 (1975) (Robinson, Comm'r, concurring), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

79. In *Action For Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), petitioners adopted a variant of this argument: They argued that broadcasters' uncertainty as to whether particular speech would be deemed indecent required the Commission, as a matter of constitutional law, to include "prime time" hours in the safe harbor. *Id.* at 666. Otherwise, they argued, the chilling effect on speech would be too great: Broadcasters, for example, might choose not to air dramas and documentaries dealing with sexual harassment and AIDS as part of their prime time programming. The court disagreed. "Whatever chilling effects may be said to inhere in the regulation of indecent speech," it responded, "these have existed ever since [*Pacifica*]." *Id.* The existence of a midnight safe harbor did not "add to [broadcasters'] anxieties," for it left them better off than if there were no safe harbor provision at all. *Id.*

This answer, though, does not seem responsive to petitioners' argument. Since the start of aggressive indecency enforcement in 1987, the courts have never allowed FCC indecency enforcement after ten o'clock p.m. Petitioners argued that the additional chill accompanying the expansion of indecency enforcement to the ten o'clock p.m. to midnight period would do unacceptable damage to free

the damage to free speech is "insubstantial" under the rule of *Broadrick v. Oklahoma*.[80] The second form of the argument adopts a balancing approach. It contends that even if the damage done to free speech by the imprecision of the FCC's channelling of indecent speech is more than de minimus, the government interest in limiting the distribution of that speech to children is more weighty and should prevail.[81]

Does either approach excuse the vagueness of the FCC's indecency rule? Neither seems dispositive. It is true that the vagueness inherent in the FCC's indecency rule does not inhibit the availability of sexually explicit speech *except* in broadcast television and radio, during the daytime and in the evening before the onset of the Commission's nighttime "safe harbor." Still, it seems hard to say that the effect of that vagueness on the communications marketplace is so small as to be completely insubstantial. While speech in nonbroadcast media is uncensored, broadcast television and radio remain central in the American media universe. It would be unrealistic to say that removing speech from radio, and relegating it to record store bins, has no effect on its potential influence in the marketplace of ideas. The safe harbor seems similarly insufficient. The D.C. Circuit has ruled that Congress has the constitutional au-

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speech in the broadcast medium. *Id.* at 666. The dissenters agreed: Broadcasters' self-censorship, "brought about by the Commission's open-textured definition of indecency," is expanding with the "ever-increasing reach of Commission enforcement." *Id.* at 685 & n.1 (Wald, J., dissenting). That concern, said the dissenters, is relevant in defining the safe harbor. *Id.* at 685. Whatever the answer to that claim, it is hardly sufficient to respond that broadcasters would be worse off still with no safe harbor whatsoever.

80. 413 U.S. 601 (1973). In *Broadrick*, the Supreme Court ruled that a court should not invalidate a statute on overbreadth grounds unless its overbreadth is "not only . . . real, but substantial as well." *Id.* at 615. The Court ruled in *Young v. American Mini-Theatres, Inc.*, that the *Broadrick* requirement of "substantial" deterrent effect applied to vagueness claims. Young v. American Mini-Theatres, 427 U.S. 50, 59-60 (1976).

The plurality opinion in *Pacifica* cited *Broadrick* in declining to address overbreadth and vagueness in connection with the Commission's rule. Its argument, though, was that the damage to the marketplace was minimal because the expression that would be chilled — "patently offensive sexual and excretory speech" — was of low value "at the periphery of First Amendment concern." *Pacifica Found.*, 438 U.S. at 743 (plurality opinion). The remaining six Justices rejected that reasoning. *See infra* notes 136-42 and accompanying text.

81. The first approach, assuming that a law regulating speech must be invalidated if its vagueness does more than de minimus damage to free speech, can be characterized as categorical (or "definitional") balancing; the second, assuming that the state interests advanced by such a law can outweigh the damage done to free speech, can be pigeonholed as ad hoc balancing. *See* Melville Nimmer, *The Right to Speak from* Times *to* Time*: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 938-48 (1968).

thority to delay the start of the safe harbor to midnight.[82] If Congress accepts that invitation, the fact that broadcasters will be able to program freely during the safe harbor period will do little to ameliorate the damage to First Amendment values. The exclusion of borderline programming from the evening hours when most Americans watch television[83] (indeed, from "all hours when most working people are awake")[84] will sharply limit the audience that programming can reach.

The second approach is differently flawed: Its shortcoming is that it is not the law. So far as I am aware, no court has adopted a balancing approach to vagueness issues; governing law has always treated vagueness as a categorical bar.[85] Nor does a balancing approach seem like a good idea in this context. For First Amendment law to tolerate substantial vagueness, so long as a judge deemed governmental interests served by the regulation to be more important, would eviscerate vagueness doctrine. Moreover, there is no useful way in which a court could "balance" the damage done by vagueness against governmental interests served by a particular rule; the two are incommensurable.[86] Such ad hoc balancing, compared to a categorical approach, is unpredictable, manipulable and more likely to color results with the judge's own value preferences.[87]

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82. In *Action For Children's Television v. FCC*, 58 F.3d 654 (D.C. Cir. 1995), the court directed the FCC to limit its ban on indecent speech to the period ending at ten o'clock p.m., but stated that Congress constitutionally could extend that period to midnight so long as it made the extension applicable to all broadcasters. *Id.* at 657.

83. In four cities studied by the FCC, the percentage of adults watching television just after midnight averaged about eight percent. *See* Enforcement of Prohibitions Against Broadcast Indecency, 4 F.C.C.R. 8378, 8378-94 (1989). In rural areas, the proportion may be lower. *Id.*

84. *Action for Children's Television*, 58 F.3d at 688 (D.C. Cir. 1995) (Wald, J., dissenting).

85. Chief Justice Burger, at one point in *Miller*, takes the position that appellant's vagueness argument *must* be rejected, for "[i]f the inability to define regulated materials with ultimate, god-like precision altogether removes the power of [government] . . . to regulate, then 'hard core' pornography may be exposed without limit to the juvenile, the passerby, and the consenting adult alike." Miller v. California, 413 U.S. 15, 27-28 (1973). One can read this as adopting the balancing position discussed in text, taking the position that obscenity regulation was so vital (and the absence of obscenity regulation so unthinkable) that it outweighed any vagueness concerns. That view, however, was never explicitly stated in *Miller*.

86. *See generally* Laurent Franz, *Is the First Amendment Law? - A Reply to Professor Mendelson*, 51 CAL. L. REV. 729, 748-49 (1963) (arguing that a judge charged with balancing in the First Amendment context must first "measur[e] the unmeasurable" and then "compare the incomparable").

87. *See* Nimmer, *supra* note 81, at 939-48.

At the very least, it is questionable whether the FCC's indecency rule should survive vagueness challenge. It is notable that the courts have had so little to say on the topic. In other media, the judicial attitude to indecency regulation has seemed more hostile. In 1974, when the Supreme Court considered a statute banning the mailing of any "obscene, lewd, lascivious, indecent, filthy or vile article,"[88] the Court overcame vagueness problems by imposing a narrowed reading on the language: It limited the law's coverage to obscenity, reading the remaining words out of the statute.[89] When the Court later confronted the federal dial-a-porn statute, it held that law's ban on indecent commercial telephone messages unconstitutional.[90] By contrast, when faced with broadcast indecency in 1978, the Court was considerably more diffident, upholding the FCC and ignoring the vagueness issue.[91]

This seems odd. To understand it, it is useful to go back to *Pacifica*. Perhaps a closer examination of that decision will shed some light on the Court's approach.

III. *PACIFICA*

Readers of this Symposium by now should be familiar with the facts of *Pacifica*: WBAI-FM in New York, on a Tuesday afternoon in 1973, broadcast a twelve-minute monologue by George Carlin, called "Filthy Words," taken from an album that Carlin had released.[92] The monologue was broadcast as part of a call-in program devoted that day to society's attitudes towards language.[93] Carlin addressed "the curse words and the swear words . . . words you couldn't say on the public . . . airwaves."[94] In the course of the discussion, he used the word "shit" (or variants) more than seventy times and the word "fuck" (or variants) more than thirty times.[95]

The Commission ruled that WBAI's broadcast of the monologue violated the prohibition in 18 U.S.C. § 1464 barring the

88. 18 U.S.C. § 1461 (1988).

89. Hamling v. United States, 418 U.S. 87, 110-16 (1974).

90. Sable Communications, Inc. v. FCC, 492 U.S. 115 (1989). The Court based its opinion on overbreadth concerns; it did not discuss vagueness. *Id.*

91. *See Pacifica*, 438 U.S. 725 (1978).

92. Pacifica Found. (WBAI-FM) 56 F.C.C.2d 94, 95 (1975), *on reconsideration*, 59 F.C.C.2d 892 (1976), *rev'd*, 566 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

93. *Id.* at 95-96.

94. *Id.* at 100.

95. *See id.* at 100-02 (providing transcript of Carlin's monologue).

broadcast of "obscene, indecent and profane language."[96] It reasoned:

> [T]he concept of "indecent" is intimately connected with the exposure of children to language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience.[97]

Applying that thinking to the facts before it, the Commission concluded that Carlin's words

> depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium and are accordingly "indecent" when broadcast on radio or television. These words were broadcast at a time when children were undoubtedly in the audience (i.e., in the early afternoon). Moreover, the pre-recorded language with the words repeated over and over was deliberately broadcast. We therefore hold that the language as broadcast was indecent and prohibited by 18 U.S.C. 1464.[98]

The agency did not issue a fine against Pacifica (WBAI's owner), but stated that "this order will be associated with the station's license file" and hinted that the transgression would carry weight "in the event that subsequent complaints are received."[99]

I want to linger a bit on the practical consequences of the FCC's action, for those consequences played an important role in the Supreme Court's later analysis. The Court stressed that the FCC "did not purport to engage in formal rulemaking or in the promulgation of any regulations."[100] Rather, the FCC's order " 'was issued in a specific factual context;' questions concerning possible action in other contexts were expressly reserved for the future."[101] Accordingly, the Supreme Court treated the Commission's action

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96. *Pacifica Found.*, 56 F.C.C.2d at 96.

97. *Id.* at 98 (footnote omitted).

98. *Id.* at 99.

99. *Id.*; *see* Straus Communications, Inc. v. FCC, 530 F.2d 1001, 1006 (D.C. Cir. 1976) (discussing effect of such an order).

100. FCC v. Pacifica Found., 438 U.S. 726, 734 (1978).

101. *Id.* (quoting Pacifica Found., 59 F.C.C.2d 892, 893 (1976)).

as having no consequences beyond the particular facts of the *Pacifica* case.

This seems to me a mischaracterization. In *Pacifica*, the FCC did not consider its decision to be a "restricted railroad ticket, good for this day and train only."[102] The Commission announced a rule that would serve as a guidepost for future cases. It explained that it was issuing its opinion in order to "clarify the standards [it] . . . utilizes to judge 'indecent language.' "[103] It set out those standards, stating that the concept of indecency was intimately connected with "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience."[104] The Commission applied that test in evaluating the broadcast before it, writing: "[T]he Commission concludes that words such as 'fuck,' 'shit,' 'piss,' 'motherfucker,' 'cocksucker,' 'cunt' and 'tit' depict sexual and excretory activities and organs in a manner patently offensive by contemporary community standards for the broadcast medium" and accordingly were indecent when "broadcast at a time when children were undoubtably in the audience," at least when "the words [were] repeated over and over."[105] The agency was not adjudicating on an ad hoc basis, declining to say anything with future applicability.[106]

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102. Smith v. Allwright, 321 U.S. 649, 669 (1944) (Roberts, J., dissenting).

103. *Pacifica Found.*, 56 F.C.C.2d at 99; *see also id.* at 94.

104. *Id.* at 98.

105. *Id.* at 99.

106. In one respect, the Commission's opinion was quite unclear: It was ambiguous about the fate of offensive speech broadcast in the late evening and nighttime hours. *See id.* at 98-99. The rationale of the opinion suggested that material broadcast when there was not a reasonable risk of children in the audience would not be deemed indecent. *Id.* But the opinion indicated at one point that offensive sexually explicit material would be deemed indecent at any time of day or night unless it had serious "value;" it suggested at another point only that it was "conceivabl[e]" that serious value might save speech from indecency when "the number of children in the audience is reduced to a minimum." *Id.*

This lack of clarity was necessitated by the Commission's internal divisions. Commissioners Reid and Quello believed that language like that broadcast in the *Pacifica* case should be banned at any time of day or night, without regard to the presence or absence of children in the audience. *See id.* at 102 (concurring statement of Commissioner Reid); *id.* at 102-03 (concurring statement of Commissioner Quello). Commissioners Robinson and Hooks, on the other hand, took the view that the Commission had no power to regulate indecency except insofar as it sought to protect children. *See id.* at 107-09 (concurring statement of Commissioner Robinson). That disagreement, though, should not obscure the agency's consensus as to the daytime hours: All agreed that during the day the FCC legitimately could "protect[ ] children of impressionable age from language to which

The FCC in *Pacifica* did rely to some degree on the "raised eyebrow" — regulation through informal pressure rather than neutral rule[107] — and the discouraging hint. When broadcasters, on reconsideration, requested a clarifying statement relating to the broadcast of indecent words "as a part of a bona fide news or public affairs program," the Commissioners refused to provide one, answering that they "would not comment on . . . hypothetical situations."[108] Rather, the FCC repeated its exhortation to broadcasters that the "real solution" was the "exercise of licensee judgment, responsibility, and sensitivity."[109] This was hardly reassuring to broadcasters seeking clear-cut guidelines to follow; it seemed designed to ensure that they would " 'steer far wider of the unlawful zone.' "[110]

Indeed, the Commission's *Pacifica* decisions twice cited the *Yale Broadcasting* case, one of the agency's most notorious examples of "raised eyebrow" regulation.[111] In the 1971 *Yale Broadcasting* proceeding, the FCC had sought to discourage the broadcast of rock songs with lyrics assertedly promoting or glorifying illegal drug use.[112] The agency issued a public notice declaring that it would contravene licensee "responsibility" for a broadcaster to play a record without a "management level executive . . . knowing the content of the lyrics," making the judgment whether the record "promotes . . . illegal drug usage," and on that basis making a judgment whether playing the record would promote the public interest.[113] The Commission stressed that "when there is an epidemic of illegal drug use — when thousands of young lives are being destroyed . . . the licensee should not be indifferent to the question of whether his facilities are being used to promote the illegal use of harmful drugs."[114] Such indifference was inconsistent with the

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they ought not to be exposed." *Id.* at 109 (concurring statement of Commissioner Robinson).

107. *See generally* Jonathan Weinberg, *Broadcasting and the Administrative Process in Japan and the United States*, 39 BUFF. L. REV. 615, 625-28 (1991).

108. *Pacifica Found.*, 59 F.C.C.2d at 892, 892-93, *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'd*, 438 U.S. 726 (1978).

109. *Id.* at 892 (quoting *Pacifica Found.*, 56 F.C.C.2d at 99-100).

110. Baggett v. Bullitt, 377 U.S. 360, 372 (1964) (quoting Speiser v. Randall, 357 U.S. 513, 526 (1958)).

111. *Pacifica Found.*, 59 F.C.C.2d at 893; *Pacifica Found.*, 56 F.C.C.2d at 99-100.

112. Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

113. Licensee Responsibility to Review Records Before Their Broadcast, 28 F.C.C.2d 409, *on reconsideration*, 31 F.C.C.2d 377 (1971), *aff'd sub nom.* Yale Broadcasting v. FCC, 478 F.2d 594 (D.C. Cir.), *cert. denied*, 414 U.S. 914 (1973).

114. Licensee Responsibility to Review Records Before Their Broadcast, 31 F.C.C.2d 377, 378 (1971).

broadcaster's duties as a "public trustee . . . who is fully responsible for . . . operation in the public interest," and could "jeopardize" a broadcaster's license.[115] The FCC's instruction to broadcasters that they could avoid sanctions if only they exercised "responsibility," in *Pacifica* as in *Yale Broadcasting*, was far from the world of precise instructions and hard-edged rules.

Nonetheless, the Commission in *Pacifica* did enunciate a standard for judging indecency — "language that describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities and organs, at times of the day when there is a reasonable risk that children may be in the audience" — and it was surely appropriate for the reviewing court to consider whether the uncertainty of the formulation's coverage would lead to the chilling of speech. There was clear reason to think that it would. While the Commission's language plainly was designed to affect future broadcaster conduct, the scope of the prohibition was anything but crystalline. As Judge Bazelon mused when the matter reached the D.C. Circuit, the Commission's national standard for judging offensiveness seemed on close examination to be "chimerical."[116] The agency had not sought to formulate a standard through expert testimony or polls; it had "simply recorded its conclusion that the words were indecent."[117] This led Judge Bazelon to suspect that the Commission's so-called national standard was in fact "either the composite of the individual Commissioners' standards or what they suppose are the national standards."[118]

When the *Pacifica* case came to the Supreme Court, though, the Court upheld the FCC's action by a five to four vote.[119] For the most part, the five Justices supporting the Commission were able to unite behind a single majority opinion, written by Justice Stevens.[120] At crucial points, Justice Stevens was able to get the votes of

115. *Id.* at 379-80. Commissioner Robert E. Lee expressed the "hope that the action of the Commission . . . will discourage, if not eliminate the playing of records which tend to promote and/or glorify the use of illegal drugs . . . . Obviously . . . the licensee will exercise appropriate judgment in determining whether the broadcasting of such records is in the public interest." *Licensee Responsibility to Review Records Before Their Broadcast*, 28 F.C.C.2d at 410 (Lee, Comm'r, concurring). Commissioner Houser agreed. *Id.* at 411 (Houser, Comm'r, concurring).

116. Pacifica Found. v. FCC, 556 F.2d 9, 23 (D.C. Cir. 1977) (Bazelon, C.J., concurring), *rev'd*, 438 U.S. 726 (1978).

117. *Id.*

118. *Id.* (footnotes omitted).

119. FCC v. Pacifica Foundation, 438 U.S. 726 (1978).

120. *See id.* at 729.

only Chief Justice Burger and Justice Rehnquist for his analysis; portions of his opinion, therefore, represent the votes only of that plurality.[121] The remaining Justices supporting the Commission — Justices Powell and Blackmun — announced their own reasoning in a separate opinion by Justice Powell.[122]

The first key question in the Court's review of the FCC's action was the proper scope of judicial review.[123] The majority began its analysis by dictating that its scrutiny would be limited to the particular circumstances of the WBAI broadcast.[124] The effect of this holding was to prevent the Court from considering vagueness. The radio station, after all, had not contested whether the Carlin monologue fell within the FCC's indecency definition; it conceded that it did.[125] The danger presented by any vagueness in the Commission's rule was that *other* persons would be chilled from speaking because of uncertainty as to whether the Commission would deem *their* speech indecent, and that the Commission would more easily be able to indulge its own prejudices in deciding which other persons to pursue for indecency violations. For the Court to limit its analysis to "the question whether the Commission has the authority to proscribe this particular broadcast"[126] prevented any consideration of those dangers.

This is curious. Courts commonly adjudicate vagueness claims like the one *Pacifica* presented.[127] Why was it proper for the *Pacifica* Court to limit its scrutiny? Justice Stevens briefly addressed this question in the portion of his opinion joined by all five Justices. The Commission's action, he reasoned, was an adjudication, not a rule-making.[128] The Commission had issued its order in a "specific factual context," confining its holding to the particular facts before it, and had declined to address questions regarding possible action in other contexts. In consequence, Justice Stevens continued, the Supreme Court should similarly limit its focus.[129] After all, the Court reviewed "judgments, not . . . opinions."[130]

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121. *Id.* Only Chief Justice Burger and Justice Rehnquist joined Justice Stevens with respect to Parts IV-A and IV-B of his opinion. *Id.*

122. *Id.* at 755-62 (Powell, J., joined by Blackmun, J., concurring in part).

123. FCC v. Pacifica Found., 438 U.S. 726, 734-55 (1978).

124. *Id.* at 735.

125. *See id.* at 739.

126. *Id.* at 742 (plurality opinion).

127. *See e.g.*, Kolender v. Lawson, 461 U.S. 352, 358 n.8 (1983).

128. FCC v. Pacifica Found., 428 U.S. 726, 734 (1978).

129. *Id.* at 734-75.

130. *Id.* at 734 (quoting Black v. Cutter Lab., 351 U.S. 292, 297 (1956)).

This analysis — focusing on the adjudicatory nature of the case, and its "specific factual context" — is surely understandable. Judge Tamm, writing in support of the D.C. Circuit's contrary decision, had taken the position that the Commission's standard was invalid because it was overbroad — that is, that there existed a substantial set of potential cases, not currently before the court, in which application of the Commission's standard would lead to unconstitutional results.[131] By holding that its analysis would be limited to "whether the Commission has the authority to proscribe this particular broadcast," the court avoided overbreadth and vagueness issues.

Nonetheless, the analysis is problematic. First, as I suggested earlier, it mischaracterizes the Commission's action.[132] Second, on a more basic level, the fact that the FCC was engaged in adjudication does not seem at all linked to the question whether the Court should have worried about overbreadth. In adjudication as well as in rule-making, broad statements by the regulator can have a chilling effect on speakers not before the Court; it is that chilling effect that triggers overbreadth concerns.[133] Moreover, the fact that the FCC was engaging in adjudication surely did not dispel any possible overbreadth problems arising from the sweeping language of 18

Indeed, Justice Stevens suggested that discussion of the agency's reasoning would be beyond the Court's Article III power. *See id.* at 734-35 ("However appropriate it may be for an adjudicatory agency to write broadly in an adjudicatory proceeding, federal courts have never been empowered to issue advisory opinions."). That was hyperbolic; the propriety of federal courts addressing hypothetical cases in order to evaluate claims of First Amendment overbreadth and vagueness was then well-established. *See, e.g.*, Gooding v. Wilson, 405 U.S. 518 (1972).

131. Pacifica Found. v. FCC, 556 F.2d 9, 16-17 (D.C. Cir. 1977).

132. *See supra* notes 92-103 and accompanying text.

133. In *Hustler Magazine v. Falwell*, for example, the Court held that "public figure" plaintiffs cannot invoke the common-law tort of intentional infliction of emotional distress to punish speech that would not give rise to liability for defamation. 485 U.S. 46, 46 (1988). In *Hustler*, plaintiff Jerry Falwell argued that his invocation of the tort was consistent with the First Amendment, because he sought to sanction "outrageous" speech. *Id.* at 50. Chief Justice Rehnquist, writing for the Court, replied that "outrageousness" supplies no principled standard. *Id.* Rather, as applied to speech, it "has an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* at 55. Put another way, the "outrageousness" standard was vague. *But cf.* Robert Post, *The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation, and* Hustler Magazine v. Falwell, 103 HARV. L. REV. 601, 632 (1990) (problem with "outrageousness" standard was not that it was subjective, but that "it would enable a single community to use the authority of the state to confine speech within its own notions of propriety").

U.S.C. § 1464, which bans the use of "any obscene, indecent or profane language by means of radio communications."[134]

Indeed, when it came to the vagueness issue — whether the Commission's approach gave broadcasters adequate warning of what speech would and would not be subject to sanctions — the Court's emphasis that it was reviewing an adjudication rather than a rule seems exactly backwards. Rules are more likely to give fair warning to regulated parties and less likely to invite arbitrary enforcement, because the rules circumscribe the regulator's future actions. Case-by-case adjudication is problematic because it is less constraining, except to the extent that it generates holdings that look like hard-edged, black-letter rules — but to that extent, the fact that the Commission is adjudicating is irrelevant.

The issue of vagueness, in the context of the *Pacifica* opinion, has an Alice-in-Wonderland feel to it. First Amendment philosophy normally requires that the government regulate speech only by means of hard-edged, nondiscretionary rules.[135] That is what the vagueness doctrine in First Amendment law is about: The concept of vagueness only makes sense as an attribute of a *rule* regulating speech. In *Pacifica*, though, the Supreme Court upheld the FCC's sanction by insisting that the Commission had no rule; it endorsed speech regulation by means of ad hoc, informal, case-by-case, fact-specific adjudication. Not only did the Court not require that the FCC apply a hard-edged, precise rule, it did not seem to require that the agency apply any rule. Insofar as one could tell from the plurality opinion, it was permissible for the FCC simply to make up its speech regulation, in an unpredictable manner, as it confronted each new "factual context." It is only a little hyperbolic to conclude that the problem with the vagueness attack in *Pacifica* was that the FCC's action, as the Justices construed it, departed so far from the First Amendment ideal of regulation through clearly defined rules that the concept of vagueness no longer made sense.

Is there other support for the Court's approach to vagueness in *Pacifica*? The Justices did offer other arguments in their separate opinions. Justice Stevens, in the portion of his opinion signed only by the plurality, argued that the Court need not look beyond the facts before it, and administer the "strong medicine"[136] involved in invalidating a statute on the basis of hypothetical fact-situations, be-

134. 18 U.S.C. § 1464 (1988).

135. *See supra* notes 19-26 and accompanying text.

136. FCC v. Pacifica Found., 438 U.S. 726, 743 (1978) (quoting Broadrick v. Oklahoma, 413 U.S. 601, 613 (1973)).

cause no important speech was at stake.[137] While "the Commission's order may lead some broadcasters to censor themselves," at worst the Commission's definition would "deter only the broadcasting of patently offensive references to excretory and sexual organs and activities," constituting low-value speech "at the periphery of First Amendment concern."[138] The fact that such speech might be chilled, according to Justice Stevens, should be of little concern to the Court.[139]

That view, however, was confined to the three Justices in the plurality. It was explicitly rejected by six Justices — not only by the dissenters, but by Justices Powell and Blackmun as well. The concurring Justices spurned the view that the Court could limit the scope of its analysis by judging "the value of the protected speech that might be deterred."[140] The Court, they urged, had no authority to conclude that Carlin's monologue was deserving of less protection or was less valuable than other speech.[141] Instead, the concurring Justices offered a suggestion of their own as to why it was appropriate for the Court to limit its review to the facts before it: Because "the Commission may be expected to proceed cautiously, as it has in the past," broadcasters had no cause to fear aggressive enforcement and should not feel a chill.[142] This thinking held up well for a while, but the prediction proved incorrect when

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137. *Id.*

138. *Id.*

139. This argument echoed a statement the Court had made two years earlier in Young v. American Mini-Theatres, Inc., 427 U.S. 50, 61 (1976). The Court in *Young* rejected a vagueness attack on an ordinance regulating adult theatres. It stated in part that

> there is surely a less vital interest in the uninhibited exhibition of material that is on the borderline between pornography and artistic expression than in the free dissemination of ideas of social and political significance
>
> . . . .
>
> The fact that the First Amendment protects some, though not necessarily all, of that material from total suppression does not warrant the further conclusion that an exhibitor's doubts as to whether a borderline film may be shown in his theatre . . . involves the kind of threat to the free market in ideas and expression that justifies [overbreadth and vagueness remedies].

Id. at 61. The precedential value of that language, however, is doubtful. Justice Powell, who provided the fifth vote, joined the relevant portion of the majority opinion only after stating his understanding that its conclusions did not "depend on distinctions between protected speech." *Id.* at 73 n.1 (Powell, J., concurring in judgment and portions of opinion).

140. *Pacifica,* 438 U.S. at 761 n.4 (Powell, J., concurring in part and concurring in judgment).

141. *Id.* at 761 (Powell, J., concurring in part and concurring in judgment).

142. *Id.* at 761 n.4 (Powell, J., concurring in part and concurring in judgment).

the Commission sharply expanded its indecency enforcement in 1987.[143]

One might argue that I am making too much of the Court's failure to discuss vagueness in *Pacifica*. Perhaps the Justices simply were not paying attention to the issue, which after all was not highlighted in the briefs. A difficulty with that idea, though, is that the Court, when *Pacifica* came before it, was excruciatingly familiar with vagueness claims in the regulation of sexually explicit speech. In 1973, when the Court issued its five to four *Miller* and *Paris Adult Theatre* decisions, finally ending its sixteen-year battle over the constitutional status of obscenity, four dissenting Justices argued that the Court's newly-minted standard was unconstitutional because it was unconstitutionally vague.[144] Indeed, for three of the Justices, vagueness was the *sole* ground of their dissent.[145] In 1976, when the Court issued its five to four decision in *Young v. American Mini-Theatres, Inc.* concerning zoning regulation of adult movie theatres, four Justices dissented on the ground that the ordinance challenged in that case was unconstitutionally vague.[146] Vagueness had been a crucial battleground in the wars over sexually explicit speech; perhaps what is most striking is that *none* of the nine Justices in *Pacifica* thought it worth discussing.

One argument, though, remains. Justice Stevens indicated that it was appropriate for the Court to limit its review in *Pacifica* because the Justices had turned back a similar vagueness claim eleven years earlier in *Red Lion Broadcasting Co. v. FCC*,[147] a foundational broadcast-regulation case.[148] In *Red Lion*, the Court had upheld the FCC's fairness doctrine and personal attack rule against First Amendment challenge; the decision established the propriety

143. The plurality obliquely suggested that it was appropriate for the Court to limit its review to the specific facts before it because indecency "is largely a function of context [and] cannot be adequately judged in the abstract." *Pacifica*, 438 U.S. at 742 (plurality opinion). The notion is an interesting one; perhaps vagueness is permissible in the indecency context because it is inevitable. It appears, however, only as a hint in a single sentence in Justice Stevens' opinion. *Id.* It is nowhere developed.

144. *See* Miller v. California, 413 U.S. 15, 37-44 (1973) (Douglas, J., dissenting); Paris Adult Theater I v. Slaton, 413 U.S. 49, 83-93, 103 (1973) (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

145. *See Paris Adult Theatre I*, 413 U.S. at 85 n.9 (Brennan, J., joined by Stewart & Marshall, JJ., dissenting).

146. Young v. American Mini-Theatres, Inc., 427 U.S. 50, 88-96 (1976) (Blackmun, J., joined by Brennan, Stewart & Marshall, JJ., dissenting).

147. 395 U.S. 367 (1969).

148. *See Pacifica Found.*, 438 U.S. at 742-43 (plurality opinion) (discussing Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 395-96 (1969)).

of direct FCC regulation of broadcast content. There, too, Justice Stevens noted, the Court gave short shrift to a vagueness attack.[149]

It seems to me that the answer to the vagueness issue in *Pacifica* begins with Justice Stevens' reference to *Red Lion.* The secret of FCC indecency regulation is that it is *broadcast* regulation: FCC regulation of indecency departs from the usual First Amendment rules in a way characteristic of FCC regulation of broadcasting as a whole.

IV. BROADCASTING, VAGUENESS AND THE "PUBLIC INTEREST"

So far in this article, I have marvelled at the extent to which FCC regulation of broadcast indecency is characterized by vague standards and situationally sensitive judgments. In ordinary First Amendment law, that is anathema; law enforcers are expected to rely on hard-edged rules.[150] When one takes a closer look at broadcast regulation, though, the vagueness of the broadcast indecency rule begins to seem less surprising: One sees vague standards and situationally sensitive decision-making everywhere.

As Justice Stevens points out in *Pacifica,* the ordinary First Amendment requirement that law "carefully define and narrow official discretion" does not seem to apply to FCC licensing.[151] Rather, Congress and the courts have directed the FCC to govern the electronic mass media by looking to the "public interest, convenience and necessity."[152] The "vaguish, penumbral bounds" of that standard leave wide discretion and require imaginative interpretation.[153] They yield no predictability or protection against bias.[154]

Consider the scheme by which the FCC grants licenses: The FCC is directed to award broadcast licenses to the applicants who would best serve the "public interest, convenience, and necessity."[155] That standard is anything but clear-cut; on the contrary, it is nearly content-free. The FCC's process of choosing among would-be licensees, when more than one applies for a given author-

149. *Id.*

150. *See supra* notes 19-26 and accompanying text.

151. *Pacifica,* 438 U.S. at 747 (plurality opinion) ("[A]lthough other speakers cannot be licensed except under laws that carefully define and narrow official discretion, a broadcaster may be deprived of his license and his forum if the Commission decides that such an action would serve 'the public interest, convenience and necessity.' ").

152. *See, e.g.,* 47 U.S.C. § 309(a) (1988).

153. FCC v. RCA Communications, Inc., 346 U.S. 86, 90-91 (1953).

154. *See* Weinberg, *supra* note 47, at 1170-71.

155. 47 U.S.C. § 309(a) (1988).

ization, has not been objective and definite. The agency's "inherently complex" decisional process has not lent "itself to precise categorization or to the clear making of precedent."[156] Its decisions have rested on an extensive list of factors that the agency has been unable to quantify or order and that have differentiated applicants in "almost infinitely variable" ways.[157]

As originally enunciated and applied by the FCC, the FCC's licensing process was a model of situationally sensitive, ad hoc judgment. The agency saw itself as reaching, in each instance, "an overall relative determination upon an evaluation of all factors, conflicting in many cases."[158] It sought to decide each case on the basis of "the deposit of its experience, the disciplined feel of the expert."[159] That was the opposite of a hard-edged, rule-bound determination. The FCC later sought to achieve a more mechanical, objective licensing process, but was never able to come up with useful objective criteria for determining which broadcast applicants, if licensed, would best serve the public interest. Except to the extent that it abandoned the traditional comparative hearing for auctions or lotteries, the Commission's licensing decisions remained arbitrary, neither consistent nor predictable.[160] The agency is currently rethinking its comparative criteria[161] and has frozen its comparative decision-making pending that review.[162]

The FCC has exercised considerable discretion in its other dealings with broadcast licensees. When it comes to the question whether to renew a license, for example, the statute once again directs the FCC to look to the "public interest, convenience and necessity."[163] While the agency has often resisted any extensive inquiry at this stage, the vagueness of the statutory standard has contributed to confusion and incoherence in the Commission's approach.[164] For forty years, the FCC required broadcasters to provide a "reasonable opportunity" for the presentation of opposing

156. Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 393 (1965).

157. *Id.*

158. Johnston Broadcasting Co. v. FCC, 175 F.2d 351, 357 (D.C. Cir. 1949).

159. FCC v. RCA Communications, Inc., 346 U.S. 86, 91 (1953).

160. *See* Weinberg, *supra* note 47, at 1115-20.

161. *See* Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664 (1992), 8 F.C.C.R. 5475 (1993), 9 F.C.C.R. 2821 (1994).

162. *See* FCC Freezes Comparative Proceedings, 9 F.C.C.R. 1055 (1994).

163. 47 U.S.C. §§ 308, 309 (1988).

164. *See generally* Weinberg, *supra* note 47, at 1120-26.

points of view on "controversial issues of public importance;"[165] that doctrine too was imprecise, subjective and fact-bound in its application.[166] The Children's Television Act of 1990 provides a small but telling example of broadcast regulatory method: It directs the Commission to "consider," in reviewing a television renewal application, "the extent to which the licensee . . . has served the educational and informational needs of children."[167] The standard, again, does not lend itself to precise and objective application.[168]

As I indicated at the start of this article, this is odd. In the broadcast licensing context in particular, one would have thought that clear rules were essential. Because broadcast licenses are extremely valuable, a licensing system that allows a government agency extensive decision-making discretion leaves licensees and would-be licensees eager to curry favor with the agency and reluctant to offend it. To that end, licensees and would-be licensees may moderate their own speech to accord with perceived governmental desires. Even if there is no such self-censorship, vague decision-making standards allow the licensor to advance its own political agenda by granting licenses to those applicants whose speech it favors.[169]

Because of the threat that government discretion may become " 'a means for suppressing a particular point of view,' "[170] the

165. *See* Handling of Public Issues Under the Fairness Doctrine, 48 F.C.C.2d 1, 10-17 (1974), *aff'd in part, rev'd in part sub nom.* National Citizens Comm. for Broadcasting v. FCC, 567 F.2d 1095 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 926 (1978); *see also* 47 U.S.C. § 315(a) (1988).

166. *See* Weinberg, *supra* note 47, at 1126-28.

167. 47 U.S.C. § 303b(a) (1988).

168. In the agency's initial efforts to implement the statute, it received extensive filings asserting that broadcasters had served the educational and informational needs of children through such programming as "GI Joe," "The Jetsons" and "Super Mario Brothers." *See* Edmund L. Andrews, *Broadcasters, to Satisfy Law, Define Cartoons as Education*, N.Y. TIMES, Sept. 30, 1992, at A1; Joe Flint, *Study Slams Broadcasters' Kids Act Compliance*, BROADCASTING, Oct. 5, 1992, at 40. Five years after enactment, the FCC is still looking for a workable way to enforce the statutory requirements. *See* Policies and Rules Concerning Children's Television Programming, 10 F.C.C.R. 6308 (Apr. 7, 1995).

169. In the 1950s, for example, television applicants owning newspapers that had endorsed Eisenhower in the preceding election were more successful in FCC comparative licensing proceedings than were applicants owning newspapers that had endorsed Stevenson. *See* Bernard Schwartz, *Comparative Television and the Chancellor's Foot*, 47 GEO. L.J. 655, 689-94 (1959). The FCC issued its 1965 Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393 (1965), providing for a more mechanical examination of broadcast applicants, in part as a reaction to that news. *See generally* Weinberg, *supra* note 47, at 1115-20.

170. Forsyth County v. Nationalist Movement, 505 U.S. 123, 130 (1992) (quoting Heffron v. International Soc'y for Krishna Consciousness, 452 U.S. 640, 649 (1981)).

Supreme Court has insisted that government agencies administering licensing requirements for speech be governed by " 'narrow, objective and definite standards.' "[171] If a license scheme involves the "appraisal of facts, the exercise of judgment, and the formation of an opinion by the licensing authority, the danger of censorship and of abridgement of our precious First Amendment freedoms is too great to be permitted."[172] Thus, in *City of Lakewood v. Plain Dealer Publishing Co.*,[173] the Supreme Court struck down an ordinance giving a government officer discretion, within the bounds of the "necessary and reasonable," to grant or deny permission to place newspaper vending machines on public sidewalks.[174] While the permit requirement served legitimate goals, the vague regulatory scheme made "post hoc rationalizations by the licensing official and the use of shifting or illegitimate criteria . . . far too easy," and could "intimidate[ ] parties into censoring their own speech."[175] It was particularly "threatening" because it involved a "multiple or periodic licensing requirement," ensuring that newspapers were "under no illusion regarding the effect of the 'licensed' speech on the ability to continue speaking in the future."[176] Broadcast regulation, though, has not seemed to follow those rules.

In that light, we need to re-evaluate the FCC's regulation of indecent broadcasting. It is vague and imprecise, to be sure, apparently in violation of ordinary First Amendment doctrine — but it seems no more problematic from that procedural standpoint than the rest of the body of FCC broadcast regulation.[177] Nor is that the

171. *Id.* at 131 (quoting Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51 (1969)).

172. *Id.* at 2401-02 (quoting Cantwell v. Connecticut, 310 U.S. 296, 305 (1940) and Southeastern Prod. v. Conrad, 420 U.S. 546, 553 (1975)).

173. 486 U.S. 750 (1988).

174. *Id.* at 772; *see also Shuttlesworth*, 394 U.S. 147 (1969) (invalidating ordinance giving city discretionary control over public demonstrations); Staub v. City of Baxley, 355 U.S. 313 (1958) (invalidating ordinance giving city discretionary control over solicitation by dues-charging organizations); Kunz v. New York, 340 U.S. 290, 295 (1951) (invalidating ordinance giving city discretionary control over public worship meetings); Saia v. New York, 334 U.S. 558 (1948) (invalidating ordinance giving city discretionary control over use of sound amplification devices).

175. *Lakewood*, 486 U.S. at 757-58.

176. *Id.* at 759-60.

177. One might argue that the vagueness of the FCC's indecency law is more problematic than any vagueness in its criteria for granting licenses, on the ground that it is more problematic to penalize people for conduct violating vague prohibitions than it is to allocate benefits on the basis of vague criteria. It does not offend anyone's sense of fairness that the Miss America Pageant chooses its winner on the basis of vague, subjective criteria and that its choice is unpredictable; it would seem more unfair if the pageant stripped a winner of her title on similarly unpredictable grounds.

only respect in which indecency regulation and the larger body of broadcast regulation seem in step with each other, but out of step with ordinary First Amendment law. As a matter of basic philosophy, FCC indecency law is in sync with FCC broadcast regulation generally, in a manner that leaves them both severely in tension with ordinary First Amendment thinking.

Why do we have any public-interest licensing of broadcasters? Why not allocate broadcast authorizations by lottery or by auction? Why not simply allow the right to use spectrum to be bought and sold like any other resource? Justice White's opinion in *Red Lion* contains the Court's answer.[178] If the FCC did not scrutinize broadcasters to ensure that they served the public interest, and if the FCC did not oversee the content of broadcasters' speech, the result would be "monopolization" of the marketplace of ideas.[179]

> [S]tation owners . . . would have unfettered power to make time available only to the highest bidders, to communicate only their own views on public issues, people and candidates, and to permit on the air only those with whom they agreed. There is no sanctuary in the First Amendment for unlimited private censorship operating in a medium not open to all. "Freedom of the press from governmental interference under the First Amendment does not sanction repression of that freedom by private interests."[180]

I think that argument fails adequately to distinguish First Amendment vagueness concerns from due process concerns. *See supra* note 21. The due process clauses of the Constitution require precision from the government only when the government imposes some deprivation; the language of the clauses, after all, confines their scope to cases in which a person is "deprived of life, liberty, or property." U.S. CONST. amend. V; *see also* U.S. CONST. amend. XIV. The problem with FCC indecency regulation, though, is not that it is so imprecise as to offend due process; due process vagueness doctrine is relatively forgiving when no First Amendment rights are at stake. *See, e.g.*, Village of Hoffman Estates v. Flipside, 455 U.S. 489, 491 (1982) (upholding, against vagueness attack, statute criminalizing sale without license of items "designed or marketed for use with illegal . . . drugs;" the Court took the view that the statute did not restrict protected speech). Rather, FCC indecency regulation is problematic because of the heightened vagueness requirements imposed by First Amendment law. The First Amendment imposes a requirement of precision on the government in *any* context in which the existence of a vague rule is likely to chill speech or to shield government arbitrariness or bias in the regulation of speech. A vague criminal prohibition can do that, but so can a vague licensing criterion. FCC indecency regulation does it, but so does much else in the broadcast regulatory arena.

178. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

179. *Id.* at 390.

180. *Id.* at 392 (quoting Associated Press v. United States, 326 U.S. 1, 20 (1945)).

In order to forestall such "repression . . . by private interests," the *Red Lion* opinion teaches, government must intervene in the media marketplace to safeguard the "collective right" of the "people as a whole."[181] Regulators are to guide each licensee so that it acts as a "proxy or fiduciary"[182] for the larger public. To that end, Title III of the Communications Act directs the Commission to ask, with respect to every licensing decision, whether licensing that applicant would serve the "public interest." Indeed, the FCC's responsibility to ensure that licensees operate in the "public interest" is repeated in more than half of the initial twenty-three sections of that title.[183]

This vision of the broadcast regulatory system resonates with (and helped shape) popular views of broadcasting. Society tends to think of broadcasters (in particular, television broadcasters) as speaking for the public on its behalf. Much more than newspapers, we tend to think of broadcasters as the "public trustees" that communications-law orthodoxy declares them to be. That vision, though, presupposes a role for the "public" (that is, for government) in supervising its media servants.

The FCC's statutorily-mandated quest for the public interest calls for attention to broadcast content. Broadcasters, after all, have no power to affect the public interest one way or the other, except through the content of their programming. The FCC, thus, from time to time, has looked directly to broadcasters' speech in making renewal decisions. In a series of cases in the 1960s and 1970s, the Commission explicitly based its decision not to renew a license, at least in part, on the objectionable nature of the licensee's broadcasts.[184] Because licensees can serve the "public interest" only

181. *Id.* at 390.

182. *Id.* at 389.

183. *See* 47 U.S.C. §§ 303, 303a, 305, 307, 309-311, 315-319 (1988).

184. *See* United Television Co., 55 F.C.C.2d 416, 423 (1975) (denying renewal based on licensee's broadcast of religious programming offering numbers game picks, "special money-drawing roots" and "spiritual baths" in return for monetary donations), *aff'd sub nom.* United Broadcasting Co. v. FCC, 565 F.2d 699 (D.C. Cir. 1977), *cert. denied,* 434 U.S. 1046 (1978); Star Stations, 51 F.C.C.2d 95, 107 (1975) (denying renewal based in part on licensee's use of newscasts "as a vehicle to publicize [his] preferred candidate [in a political race] — not as an exercise of news judgment, but as a deception of the public"); Alabama Educ. Television Comm'n, 50 F.C.C.2d 461 (1975) (denying renewal based on licensee's racial discrimination in programming and employment); Brandywine-Main Line Radio, Inc., 24 F.C.C.2d 18 (1970), *on reconsideration,* 27 F.C.C.2d 565 (1971) (denying renewal application of station largely devoted to religious fundamentalism and views of political right wing on grounds that licensee had violated fairness doctrine and had, when it acquired station, deceived Commission about its intention to broadcast certain religious and political programming), *aff'd on arguably narrower*

through their broadcasts, the FCC's obligation to ensure that licensees promote the public interest made it natural for the agency to assume a content-regulatory role.[185]

The Commission's *Palmetto* decision illustrates the philosophical underpinnings of the FCC's content regulation in general and

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grounds, 473 F.2d 16 (D.C. Cir. 1972), *cert. denied*, 412 U.S. 922 (1973); Palmetto Broadcasting Co., 33 F.C.C. 250 (1962) (discussed *infra* notes 187-200 and accompanying text), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964); *see also* Trustees of the Univ. of Pa., 69 F.C.C.2d 1394 (1978) (denying renewal to college radio station on ground that licensee inadequately supervised station operation; listeners had complained that station had broadcast indecent speech); Hawaiian Paradise Park Corp., 22 F.C.C.2d 459 (1970) (setting renewal application for hearing on variety of grounds including fairness doctrine, personal attack and political broadcasting violations), *reconsideration denied*, 26 F.C.C.2d 329 (1970) (licensee withdrew application); Lamar Life Broadcasting Co., 38 F.C.C. 1143 (1965) (granting short-term renewal to station that had engaged in discriminatory and one-sided programming regarding racial issues), *rev'd sub nom.* United Church of Christ v. FCC, 359 F.2d 994 (D.C. Cir. 1966) (directing FCC to hold evidentiary hearing on whether it should deny renewal outright); Pacifica Found., 36 F.C.C. 147 (1964) (granting renewal after inquiring into sexually explicit programming and possible Communist affiliations).

185. In its comparative hearings, it has been rare for the FCC to consider an applicant's past broadcast record (or proposed program service). *See* Random Selection Lottery, 4 F.C.C.R. 2256, 2266 n.17 (1989) (describing current comparative process). *But see* Simon Geller, 90 F.C.C.2d 250, 273-76 (1982), *remanded on other grounds sub nom.* Committee for Community Access v. FCC, 737 F.2d 74 (D.C. Cir. 1984) (granting substantial preference for proposed programming). When those factors are put in issue, they are "only in extraordinary cases" dispositive. Reexamination of the Policy Statement on Comparative Broadcast Hearings, 7 F.C.C.R. 2664, 2666 (1992).

Rather, the FCC in its comparative hearing process has tended to focus on nonprogramming factors that it believes will ultimately affect content. It has sought to favor license applicants that do not already own other media properties, on the theory that diversity of ownership will lead to diversity of views. *See* Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 394 (1965) (noting factors for consideration in granting broadcast licenses); *see also* Rules Relating to Multiple Ownership, 22 F.C.C.2d 306 (1970) (seeking to achieve "the maximum diversity of ownership that technology permits," and explaining that "60 different licensees are more desirable than 50, and even . . . 51 are more desirable than 50 . . . . It might be the 51st licensee that would become the communication channel for a solution to a severe social crisis."). The Commission has sought to favor women and minority license applicants, on the theory that a broadcasting industry in which minorities participate will produce more "variation and diversity" than will a more racially and ethnically homogeneous one. Metro Broadcasting, Inc. v. FCC, 497 U.S. 547, 577-81 (1990). That program is open to some question in light of Adarand Constructors Inc. v. Pena, 115 S. Ct. 2097, 2112-13 (1995). Until recently, the FCC sought to favor applications promising that the station's owners would personally participate in the day-to-day operation of the station; it reasoned in part that those broadcasters would likely show "greater sensitivity to an area's changing needs, and [would air] programming designed to serve these needs." Policy Statement on Comparative Broadcast Hearings, 1 F.C.C.2d 393, 395-96 (1965). The D.C. Circuit in *Bechtel v. FCC*, however, held the FCC's reliance on that criterion arbitrary and capricious. 10 F.3d 875, 878 (D.C. Cir. 1993).

its indecency regulation in particular.[186] This is the only case I know of in which the FCC's decision to deny renewal was explicitly based, in part, on the indecency of a broadcaster's speech.[187] At the heart of the licensee's troubles was a radio program hosted by one Charlie Walker.[188] Walker's jokes and comments were quite racy for 1960. The following is typical:

> Next Saturday it is we gonna have the big grand opening over at the new W. P. Marshall store in Greasy Thrill[189] and we gonna come over there and let it all hang out. Course if we let it all hang out in Greeleyville, there ain't gonna be enough room over there for nothin' else, is there?
>
> He says: "I believe that old dog of mine is a Baptist." I asked him why he thought his old dog was a Baptist and he says, "you know, Uncle Charlie, it is that he's done baptized every hub cap around Ann's Drawers."[190] "You say it is all that all the hub caps in Spring Gully is going to Heaven?"[191]

The Commission found that the licensee's broadcast of the Walker show was "coarse, vulgar, suggestive, and susceptible of indecent, double meaning" and called for nonrenewal.[192] There was no room for difference of taste: By any standard, however weighted for the licensee, the broadcasts were "flagrantly and patently offensive."[193] For the licensee to devote substantial time to them was "inconsistent with the public interest and, indeed, . . . an intolera-

186. Palmetto Broadcasting Co., 33 F.C.C. 250 (1962), *aff'd sub nom.* Robinson v. FCC, 334 F.2d 534 (D.C. Cir.), *cert. denied*, 379 U.S. 843 (1964).

187. *Id.* at 250. The Commission denied renewal on two independent grounds. *Id.* One was that the licensee had broadcast material that was "coarse, vulgar, suggestive, and susceptible of indecent, double meaning;" the other was that the licensee had exercised inadequate control over the station and had lied to the Commission in claiming lack of knowledge of the objectionable material. *Id.* at 251. The D.C. Circuit, affirming, relied solely on the latter ground. The Commission later followed the D.C. Circuit's approach in Trustees of the Univ. of Pa., 69 F.C.C.2d 1394 (1978) (listeners complained that college radio station broadcast indecent speech; FCC denied renewal on ground that licensee inadequately supervised station operation).

188. *Palmetto*, 33 F.C.C. at 250.

189. *Id.* at 278. Walker referred to the town of Greeleyville on the air as "Greasy Thrill." *Id.*

190. *Id.* Walker referred to the town of Andrews on the air as "Ann's Drawers." *Id.*

191. *Id.*

192. *Id.* at 255, 258.

193. *Palmetto*, 33 F.C.C. at 257.

ble waste of the only operating broadcast facilities in the community."[194]

The Commission took seriously the licensee's contention that the agency could not meddle in broadcast content without running afoul of the First Amendment, and conceded that a governmental agency could not "set itself up as a national arbiter of taste."[195] The FCC reminded the licensee, though, that the agency was "charged with the responsibility of insuring that a broadcast licensee's operation is in the public interest. It [could] grant permits and renewals only upon a finding that the public interest would be served by the grant."[196] For broadcasters to become "purveyor[s] of smut and patent vulgarity," perverting and misusing a valuable natural resource, would not serve the public interest.[197] For the agency to carry out its responsibility and deny renewal "on the grounds that the applicant's overall past programming has not been in the public interest . . . is not censorship in violation of . . . the First Amendment."[198] Indeed, "the greater danger to broadcasting" would lie in the agency's shirking its role.[199]

Last year, in *Steven A. Lerman*,[200] Commissioner Quello echoed the same theme. Infinity Broadcasting, owner of stations carrying the Howard Stern show, sought to buy an FM radio station in Los Angeles.[201] In order to do this, it needed the FCC's approval of its petition for assignment of a license. Under the statute, the FCC could not grant that approval except "upon finding . . . that the public interest, convenience and necessity will be served thereby."[202] The Commission granted the assignment.[203] It stated that Infinity's indecency violations were best addressed through monetary fines, and that the agency would not consider more sweeping action until after completing the rule-making proceeding, re-examining indecency enforcement, ordered in the D.C. Circuit's *Action for Children's Television III* panel opinion.[204]

194. *Id.* at 258.
195. *Id.* at 257.
196. *Id.* at 256.
197. *Id.*
198. *Palmetto*, 33 F.C.C. at 256.
199. *Id.* at 257.
200. Steven A. Lerman, Esq., 74 R.R.2d 743 (1994).
201. *Id.* at 743.
202. 47 U.S.C. § 310(d) (1988).
203. *Lerman*, 74 R.R.2d at 746.
204. *Id.* at 745-46 (referring to Action for Children's Television v. FCC, 11 F.3d 170 (D.C. Cir. 1993), *vacated*, 58 F.3d 654 (D.C. Cir. 1995)).

Commissioner Quello, though, dissented.[205] Noting the Commission's public interest responsibilities, he wrote that it was "antithetical to the public interest to authorize additional stations for probable dissemination of gross indecency and possible obscene broadcasts" by Howard Stern.[206] "Decent responsible people," he continued, would not likely "find it in the public interest to support additional outlets for licensees propagating lewdness, incest, deviant behavior and demeaning women, blacks and gays."[207]

Assuming that the Stern broadcasts satisfied the Commission's definition of indecency, why wasn't Quello right? In a fairly obvious sense, I think he was. The text of the Communications Act, after all, directs the FCC to be guided by the public interest in making its licensing determinations.[208] That is the law. It suggests that in making licensing decisions, the FCC is required to take into account anything that bears on the public interest, and to grant, withhold or deny licenses based on that "public interest." Obviously, the FCC believes that the broadcast of indecent speech disserves the public interest, or it would not sanction people for airing it. The licensee's broadcast of indecent speech, therefore, is relevant to the public-interest determination. A licensee that broadcasts indecent speech — speech disserving the public interest — is using its license to disserve the public interest. On that basis, one might conclude that the Communications Act *requires* the agency, in every licensing case, to consider the applicant's broadcast of indecent speech. That, after all, is a factor the Commissioners have articulated and agreed upon as relevant to the public interest.

The D.C. Circuit recently adopted that reasoning in connection with a licensee's broadcast of allegedly obscene speech.[209] In a comparative renewal proceeding, the challenger had alleged that

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Fifteen months earlier, the Commission had voted to allow Infinity to acquire three other stations. Cook Inlet Radio License Partnership, 8 F.C.C.R. 2714 (1992). In that case, Infinity had promised not to broadcast the Howard Stern show on the new stations. *Id.* at 2715 n.1. Chairman Sikes dissented, arguing that Infinity's "apparent pattern of noncompliance with the indecency laws" raised a material issue of fact regarding its fitness as a licensee. *Id.* at 2718. Commissioners Quello and Barrett wrote separately; each argued that the denial of the transfer applications would unfairly penalize the seller, a minority-owned business with an "excellent reputation." *Id.* at 2720 (separate statement of Comm'r Quello); *Id.* at 2722 (separate statement of Comm'r Barrett).

205. *Lerman,* 74 R.R.2d at 746-47 (Quello, Comm'r, dissenting).

206. *Id.*

207. *Id.* at 747.

208. *See supra* note 194 and accompanying text.

209. *See* Video 44, 3 F.C.C.R. 757, 759 (1988), *rev'd sub nom.* Monroe Communications Corp. v. FCC, 900 F.2d 351 (D.C. Cir. 1990).

the incumbent licensee had shown obscene movies on a scrambled signal.[210] The Commission declined to consider the allegation; it reasoned that obscenity complaints should be presented to the Commission contemporaneously with the offending programming, and not long after the fact in the context of a renewal proceeding.[211] The D.C. Circuit reversed. It noted that "[i]n awarding broadcast licenses, the Commission is charged with considering and promoting the public interest," and that "[o]bscene broadcasting is proscribed by statute as contrary to the public interest."[212] It continued: "[T]he fact remains that obscene broadcasts, like a number of other factors, bear on the public interest . . . . The Commission is supposed to consider the public interest in evaluating license applications."[213] The agency could not simply refuse to consider a claim "clearly bearing on the public interest."[214]

There is a problem with all this: That vision is seriously in tension with the way we think about speech in ordinary First Amendment contexts. In other contexts, after all, government cannot deny you the right to speak because it thinks that your speech disserves the "public interest." Under ordinary First Amendment philosophy, the decision whether speakers or speech advance the "public interest" is not one for government at all; government is specifically disabled from making that choice. Government may not impose content restrictions simply to advance its own notions of the "public interest."[215] All the more, it may not restrict an individual's speech in the future on the ground that something he said in the past ran contrary to the public interest.[216] That, in the words of the Supreme Court, would be "the essence of censorship."[217] Yet

210. *Id.* at 758-59.

211. *Id.* at 759.

212. *Monroe*, 900 F.2d at 357.

213. *Id.* at 358.

214. *Id.* The facts of *Monroe* differ from *Palmetto* or *Lerman* in that *Monroe* was a comparative proceeding; in the other two cases, by contrast, the Commission was considering the licensee's "basic" qualifications. No competing applicant was before the agency. One might argue that the FCC should be more willing in the free-for-all of a comparative proceeding to consider a licensee's broadcast of indecency or obscenity than it should be to use such speech as the basis for a finding that someone is unfit to be a licensee under any circumstances. The statutory standard, though, is the same: whether renewal (or transfer) would serve the public interest, convenience and necessity.

215. *See, e.g.*, Kingsley Int'l Pictures Corp. v. Regents, 360 U.S. 684, 685 (1959) (striking down statute prohibiting exhibition of movies portraying "acts of sexual immorality . . . as desirable, acceptable or proper patterns of behavior").

216. *See* Near v. Minnesota, 283 U.S. 697 (1931); *see also* Lowe v. SEC, 472 U.S. 181 (1985) (statutory construction).

217. *Near*, 283 U.S. at 713.

that, in the indecency context, is the Commission's "public interest" responsibility.

This tension, however, is not limited to FCC regulation of indecency and obscenity. Rather, it pervades the entire broadcast regulatory scheme. The larger issue here is that the entire enterprise of "public interest" regulation of broadcasting seems inconsistent with ordinary First Amendment rules. Recall the Communications Act philosophy set out in *Red Lion*: The FCC, acting on behalf of the larger community, guards against threats posed by private speakers to "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."[218] That vision is diametrically opposed to the one reflected in ordinary First Amendment law. In ordinary First Amendment philosophy, the "public" — in the form of government — is the problem. Only by confining the government regulator to nondiscretionary, content-neutral rules can constitutional law leave private autonomy free to flourish, creating the marketplace of ideas.[219]

I have argued elsewhere that our broadcast regulatory system reflects a world view, and an attitude towards law, fundamentally at odds with the world view underlying ordinary First Amendment philosophy.[220] That does not necessarily mean that our broadcast licensing scheme should be struck down as unconstitutional. It does not seem to me that the vision underlying our broadcast regulation is wholly wrong and that ordinary First Amendment thinking is wholly right. Rather, the vision underlying public-interest licensing is a legitimate one in American law and responds to real concerns. The Commission must seek to compromise those visions even where they are irreconcilable. As Commissioner Robinson urged in *Pacifica*: "[T]here is no logical ground for compromise between the right of free speech and the right to have public utterance limited to some outside boundary of decorum. But while the conflicting claims of liberty and propriety cannot be reconciled, they can be made to co-exist by tour de force."[221] He continued: "This agency, in my view, has the power to compel that coexistence in the limited scale we undertake today."[222]

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218. Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 390 (1969).

219. *See* Weinberg, *supra* note 47, at 1110-11.

220. *See id.* at 1171.

221. Pacifica Found. (WBAI-FM), 56 F.C.C.2d 94, 109 (1975) (Robinson, Comm'r, concurring), *on reconsideration*, 56 F.C.C.2d 892 (1976), *rev'd*, 556 F.2d 9 (D.C. Cir. 1977), *rev'*d, 438 U.S. 726 (1978).

222. *Id.*

What is the moral of all this? It is misleading to think about broadcast indecency regulation in isolation from the larger body of broadcast law. Broadcast indecency regulation is not unique. Procedurally and substantively, it shares the characteristics of most "public interest" regulation of the airwaves. It seems exceptional because of conflicting trends at the FCC: The agency's aggressive post-1987 indecency enforcement has contrasted sharply with its efforts otherwise to deregulate broadcasting. The FCC embraced aggressive indecency regulation in the 1980s and 1990s at the same time it embraced deregulation in other areas and successfully distanced itself from other aspects of "public interest" regulation.[223]

It is inconsistent, though, for FCC lawyers to argue for deregulation in all areas but this one. The fairness doctrine, the public trustee concept and broadcast indecency regulation have the same philosophical roots; the arguments one needs to support any of them counsel for the others as well. By the same token, someone seeking to argue in favor of the fairness doctrine but against indecency regulation is on shaky ground. If we are to set up the FCC — a government agency — as schoolmarm of the airwaves, we face a heavy burden in explaining why the agency should engage in content regulation in one area but not another.

V. CONCLUSION

It seems unlikely that FCC indecency regulation could satisfy the requirements of precision and predictability imposed by ordinary First Amendment vagueness doctrine. First Amendment law normally teaches that the government may seek to punish speech only pursuant to well-defined, easy-to-apply rules. FCC indecency regulation contains no such rules. There is no bright line defining the categories of sexually explicit speech that are and are not "patently offensive." The FCC's multi-faceted, open-textured approach to indecency maximizes the agency's discretion and minimizes the predictability of its decision-making. Hornbook First Amendment law allows none of this.

223. *See, e.g.*, Deregulation of Commercial Television, 98 F.C.C.2d 1076 (1984), *on reconsideration,* Programming and Commercialization Policies, 104 F.C.C.2d 357 (1986), *rev'd in part sub nom.* Action for Children's Television v. FCC, 812 F.2d 741 (D.C. Cir. 1987); Deregulation of Radio, 84 F.C.C.2d 968 (1981), *aff'd in part sub nom.* Office of Communication of the United Church of Christ v. FCC, 707 F.2d 1413 (D.C. Cir. 1983); Revision of Applications for Renewal of License of Commercial and Noncommercial AM, FM and Television Licensees, 49 R.R.2d 740 (1981), *aff'd sub nom.* Black Citizens for a Fair Media v. FCC, 719 F.2d 407 (D.C. Cir. 1983), *cert. denied,* 467 U.S. 1255 (1984).

FCC indecency regulation, though, is not unique: It departs from First Amendment rules in the same manner as FCC regulation of broadcasting as a whole. The FCC licensing process, and broadcast regulation in general, are pervasively characterized by vague standards and situationally sensitive decision-making. The FCC licensing process, and broadcast regulation in general, center on the government's obligation to ensure that broadcasters serve the "public interest." In both respects, FCC indecency law is in sync with the broadcast regulatory system, although sharply out of step with ordinary First Amendment thinking.

The FCC has engaged in aggressive indecency enforcement at the same time that it has embraced deregulation in other areas, and successfully distanced itself from other aspects of public interest regulation. Indecency regulation, though, shares its doctrinal and philosophical roots with other facets of the agency's public interest mission. The FCC's embrace of indecency regulation undercuts its argument that First Amendment considerations require it to abandon other portions of its traditional role. Those who champion FCC public-interest regulation, on the other hand, might do well not to wave the First Amendment flag too fiercely in fighting indecency enforcement. If the First Amendment bars the FCC from regulating indecency, it is hard to explain why that provision elsewhere allows the Commission to ensure that broadcasters operate within the "vaguish, penumbral bounds" of the public interest.